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No. 97-2063

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,
Petitioner,

v.

THE HONORABLE JOHN SPERONI,
TAMMY SNIDER, AND MICHAEL AVERY,
Respondents.

On Petition for a Writ of Certiorari to the Illinois Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AND AMERICAN LEGISLATIVE EXCHANGE COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Date: August 21, 1998

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MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation, *et al.*, respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioner. Petitioner has consented to the filing of this brief, as have counsel for Respondents Snider and Avery. Their letters of consent have been lodged with the Clerk of the Court. Respondent Speroni, the trial judge to whom Petitioner wishes a writ of mandamus to be directed, has indicated that he takes no position on the filing of *amicus curiae* briefs. In the absence of his written consent, this motion is required.

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters nationwide, including many in Illinois. While WLF engages in litigation and participates in administrative proceedings in a variety of areas, WLF devotes a substantial portion of its resources to advancing the interests of the free-enterprise system and to ensuring that economic development is not impeded by excessive litigation. To that end, WLF has appeared before this Court as well as other federal and state courts in cases touching upon the proper scope of class action litigation. *See, e.g., Matsushita Electric Industrial Co. v. Epstein*, 116 S. Ct. 873 (1996); *Diamond Multimedia Systems v. Superior Ct.*, No. S058723 (decision pending, Calif. Sup. Ct.).

The American Legislative Exchange Council (ALEC) is the nation's largest individual membership association of state legislators, with some 3,000 legislative members, hailing from all fifty states. ALEC is a nonprofit 501(c)(3) organization, whose membership is comprised of bipartisan legislators.

Amici are concerned by the proliferation of class action lawsuits being filed in state courts and the inhibiting effect that such suits can have on the development and expansion of businesses. *Amici* believe that the class-certification decisions of the Illinois courts in this case, if allowed to stand, will exacerbate that trend by encouraging efforts to certify inappropriate nationwide classes that render the underlying lawsuits essentially untriable.

Amici are filing this brief because of their interest in promoting the welfare of the business community and the public at large; they have no direct interest in the outcome of this lawsuit or of any other suits raising similar issues.

Because of their lack of direct economic interests, *amici* believe that they can assist the Court by providing a perspective that is distinct from that of any party.

For the foregoing reasons, WLF, *et al.*, respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether a court may constitutionally apply the law of the defendant's domicile to claims arising out of transactions that occurred entirely in other States, many of which have statutes or regulations specifically governing those transactions.

2. Whether it is consistent with due process requirements for a state court, in order to make class action treatment manageable, to relieve the class of its burden of proving the fact-specific claims of individual class members and to deprive the defendant of the opportunity to put on individualized proof to refute those claims.

3. Whether, in a class action seeking predominantly monetary relief, a state court's refusal to require that actual notice be provided to those members of the class whose names and addresses can be identified from Petitioner's records violates the Due Process Clause of the Fourteenth Amendment.

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BRIEF OF WASHINGTON LEGAL FOUNDATION, *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*

The interests of the *amici curiae* are set forth in the motion accompanying this brief.[1]

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby incorporate the Statement contained in the Petition for a Writ of Certiorari.

In brief, Respondents' suit challenges a long-standing business practice of Petitioner State Farm Mutual Automobile Insurance Co. ("State Farm"), whereby State Farm provides in most of its insurance policies that it may specify use of parts manufactured by sources other than the original equipment manufacturer ("non-OEM parts") when adjusting claims for damage to insured vehicles. State Farm asserts that by retaining the option to specify non-OEM parts, it encourages competition in the automobile repair parts industry and thereby reduces costs to consumers.

Respondents assert that use of non-OEM parts violates a term of State Farm's standard form insurance policies used nationwide, whereby State Farm agrees to restore a policyholder's vehicle to "its pre-loss condition" after an accident, or to "pay to repair or replace the property or part with like kind and quality." Petition Appendix ("Pet. App.") 3a. Even though many States (including Illinois) expressly authorize the use of non-OEM parts and many consumer groups support the practice, Respondents assert that all non-OEM crash parts are inferior to OEM parts, and, as a result, they may never be used to restore a vehicle to its pre-loss condition.[2] Respondents also assert

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[2] After filing suit, Respondents subsequently made clear (and the trial court accepted) that their objection did not cover *all* parts but was limited to specification of non-OEM "crash parts" (i.e., vehicle components that are typically repaired or replaced as a result of crash

that State Farm's use of non-OEM parts violates the Illinois Consumer Fraud and Deceptive Business Practices Act (the "Illinois CFA"), 815 Ill. Comp. Stat. §§ 505/1 *et seq.* Pet. App. 2a.

In July 1997, Respondents Snider and Avery filed their putative class action in Illinois Circuit Court in Williamson County, Illinois on behalf of themselves and all others similarly situated. They sought certification of a plaintiff class consisting of all State Farm policyholders in 48 states who made a claim for vehicle repairs and were provided non-OEM parts (or the monetary equivalent) -- a class consisting of about 5 million people, even after the class was pared down to exclude non-crash parts. Pet. App. at 2a-3a. State Farm opposed certification on the grounds that the proposed class failed to satisfy the requirements of the Illinois class action statute and that certification of a nationwide class would violate State Farm's due process rights. The trial judge, Respondent Speroni, nonetheless certified the class as requested. *Id.* at 2a-17a. The judge found that there was no constitutional impediment to application of Illinois law to all class members (*id.* at 10a-11a), and that the issue of State Farm's liability could be determined on a class-wide basis -- because, the judge determined, evidence of differing circumstances among class members would be relevant only to the issue of damages, not to liability. *Id.* at 15a.

The trial court subsequently determined that Respondents could dispense with individual notice to class members. *Id.* at 21a-32a. Rather, the court approved a

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damage rather than as a result of normal vehicle usage). Pet. App. 18a-20a.

notice plan that involved publication of notice in a variety of newspapers and magazines, supplemented with a public relations campaign and promotion on the Internet. *Id.* at 23a, 28a. Although recognizing that State Farm was prepared to provide the Respondents with the names and addresses of 1.8 million class members, the court rejected notice by direct mail on the ground that direct mail would cost too much and would end up alerting fewer class members than the media plan proposed by Respondents. *Id.* at 27a-28a. The court rejected State Farm's argument that due process required notification by mail, finding that such notification is not constitutionally required when other forms of notification are equally effective. *Id.* at 29a.

State Farm then sought a writ of mandamus and/or prohibition or, in the alternative, a supervisory order from the Illinois Supreme Court, challenging both the trial court's certification order and the order dispensing with individual notice. That petition was denied without comment. *Id.* at 1a. State Farm seeks review in this Court of the Illinois Supreme Court's judgment.

SUMMARY OF ARGUMENT

Amici concur with State Farm's analysis of each of the three constitutional issues set forth as Questions Presented in the Petition. *Amici* are focusing this brief on the third of those three issues -- whether the trial court's refusal to require that notice of the suit be mailed to identifiable members of the class violates the Due Process Clause of the Fourteenth Amendment.

Even in the absence of the first two issues, the trial judge's certification and notice orders would merit this Court's review. In a long line of cases, the Court has

insisted that those entitled under the Due Process Clause to notice of legal proceedings must be provided with direct notice, either in the form of personal service or notice by mail. Nonetheless, as the number of very large class actions in state and federal courts has grown in recent years, trial courts have been increasingly willing (as was the court below) to forgo direct notice on the theory that other forms of notice (such as notice by publication) are at least as cost effective. Review by the Court is warranted in order to determine whether trial courts have acted properly in their abandonment of the direct notice requirement.

Moreover, review of the notice issue should not await entry of a final judgment in the underlying class action dispute. There is considerable evidence that once a class action has been certified, defendants have little choice but to enter into a settlement, regardless of the merits of the plaintiffs' claims. Moreover, even if a defendant decides not to settle, it may never have an opportunity to appeal an improper trial-court decision to waive notice by mail. If the defendant prevails at trial, it would have no adverse judgment from which to appeal. Yet, the defendant would have no protection from subsequent suits by absent class members, who could argue convincingly that they are not bound by a judgment in a proceeding of which they were provided no direct notice.

In sum, unless State Farm is permitted review of the trial court's notice order at this stage of the proceedings, it effectively will be denied any opportunity to obtain review of the order.

REASONS FOR GRANTING THE PETITION

I. THE COURT'S SUPERVISION IS REQUIRED TO REIN IN ABUSIVE CLASS ACTIONS

As the Petition well documents, abuse of the class action process is becoming an increasingly frequent occurrence.

A class action is a device intended solely to improve the efficiency of adjudication. As the Court recently explained:

> "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for an individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."

Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231, 2246 (1997) (quoting *Mace v. Van Ru Credit Corp.,* 109 F.3d 338, 344 (1997)).

Thus, class actions are intended to serve the interests of clients in obtaining compensation for injuries suffered. But as cases such as this one well illustrate, the interests of clients have very little to do with the management of many recent class actions. Rather, class actions are used by the plaintiffs' bar as a mechanism for ensuring that rights of individual claimants are never actually litigated at trial; by creating classes sufficiently large and unwieldy, class counsel can ensure that deep-pocketed defendants are forced to enter into settlements that handsomely reward the

class counsel but often provide little if anything of value to class members.

The Petition has well documented this phenomenon of what have rightly been described as "abusive" class actions, and *amici* will not belabor the point. Suffice to say that it is not merely corporate interests who are calling on the courts to enforce strict due process limits on the use of the class action mechanism to enrich a small group of lawyers. For example, former United States Attorney General Richard Thornburgh recently testified before Congress that class action attorneys "have found ways to pervert the class-action device and other aggregation tools, transforming them into their personal litigation lottery." Statement of Richard Thornburgh before the Courts and Intellectual Property Subcommittee of the House Committee on the Judiciary (March 5, 1998), available at 1998 WL 122533. "Such suits," General Thornburgh testified, "are obviously not meant to redress real injuries, but to target prosperous and vulnerable defendants." *Id.*

Such suits would not be a large problem if trial judges enforced existing restraints on the use of class actions. Plaintiffs' attorneys, however, have discovered trial judges who are willing to certify virtually any proposed class presented to them. By returning repeatedly to these same judges -- often located in remote rural areas with little connection to the subject matter of the case -- attorneys have been able to obtain certification for increasing numbers of class actions that could not get certified in most federal courts and that are virtually never brought to trial. *See* Stateside Associates, *Class Action Lawsuits in State Courts: A Case Study in Alabama* (1998).

Guidance from this Court is urgently needed in order to impress upon trial courts the importance of adhering to the strict constitutional and statutory limitation imposed upon class actions -- including limitations on choice of law, protection of litigants' rights to litigate facts that may be unique to individual class members, and requirements that notice and an opportunity to be heard be provided to all who are purportedly to be bound by any judgment entered in a class action.

II. THE TRIAL COURT'S NOTICE ORDER CANNOT BE SQUARED WITH THIS COURT'S PRECEDENTS REQUIRING ACTUAL NOTICE

Crucial to the "success" of abusive class actions is a trial court order absolving the class representatives of the requirement that they provide actual notice of the suit to absent class members, either by personal service or by mail. Because the proposed class in such suits typically numbers in the millions, an order requiring mailed notice would be prohibitively expensive for the class representatives and would likely cause them to abandon the suit.

The trial court obliged in this case, by entering a notice order that did not require Respondents to mail notice of the suit to a single class member, despite State Farm's offer to provide the names and addresses of 1.8 million class members for such a mailing. Instead, the trial court permitted Respondents to provide notice by publishing a series of newspaper and magazine advertisements, supplemented with a public relations campaign on the Internet. Pet. App. 23a, 28a. The notice order is at odds with a long line of decisions from this Court, which invariably have held that the Due Process Clause requires

at a minimum that notice be mailed to each affected party for which an address is available.[3]

The Court squarely addressed notice requirements in the class action context in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). The Court held that under Fed.R.Civ.P. 23(c)(2), "[i]ndividual notice [of a pending Rule 23(b)(3) class action] must be sent to all class members whose names and addresses may be ascertained through a reasonable effort." *Eisen*, 417 U.S. at 173. The trial court sought to distinguish *Eisen* on the ground that *Eisen* was based on the Federal Rules of Civil Procedure, which are not binding on Illinois courts; the court noted that Rule 23(c)(2) "is *less flexible* than 735 ILCS 5/2-803, which provides Illinois state courts with considerably more discretion to determine what kind of notice is required by

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[3] It is well settled that defendants such as State Farm have standing to complain that a trial court has not required that adequate notice be provided to absent class members, even though the constitutional right being infringed belongs to the absent class members. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1988), the Court made clear that defendants suffer injury-in-fact sufficient for standing purposes if they must defend a suit in which plaintiffs (due to inadequate notice) can choose not to be bound by any judgment with which they are not satisfied. The Court explained:

> Whether it wins or loses on the merits, petitioner has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as petitioner is bound. The only way a class action defendant like petitioner can assure itself of this binding effect of the judgment is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit for damages by class members.

Shutts, 472 U.S. at 805.

a particular rule." Pet. App. 29a (emphasis in original). But that rationale fails to address the issue raised by State Farm: how much flexibility does *the Due Process Clause* provide to Illinois state courts?[4]

Moreover, the trial court failed to appreciate the extent to which both Rule 23(c)(2) and *Eisen* are constitutionally mandated. The Court in *Eisen* explained that "the 'mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject.'" *Eisen,* 417 U.S. at 173 (quoting Advisory Committee Note). The Court cited *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Schroeder v. City of New York,* 371 U.S. 208 (1962), as providing the constitutional underpinnings of notice requirements and made clear that those two cases are fully applicable in the class action context. *Id.* at 174-75.

In *Mullane,* the Court held that notice and an opportunity to be heard in pending proceedings were fundamental requisites of the right of procedural due process and that notice is not constitutionally sufficient unless it is "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane,* 339 U.S. at 314. The trial court apparently interpreted *Mullane*'s "reasonably calculated" language as a license for courts to engage in a cost-benefit analysis, and

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[4] If an absent class member in subsequent out-of-state proceedings seeks to avoid being bound by a judgment entered in this case, it is highly doubtful that a court would take into account -- in determining whether notice to the absent class member was constitutionally adequate -- that the notice complied with Illinois's civil procedure rules.

to reject notice by mail where its high costs outweigh the increased likelihood that class members will receive notice. Pet. App. 27a. *Mullane* did not sanction any such balancing process; rather, it required that notice be provided in a manner "reasonably certain to inform those affected." *Mullane,* 339 U.S. at 315. As the Court explained in *Eisen, Mullane* "held that publication notice could not satisfy due process where the names and addresses of the beneficiaries were known." *Eisen,* 417 U.S. at 174.

The Court reiterated its absolute preference, as a matter of constitutional law, for mailed notice over notice by publication in *Schroeder.* 371 U.S. at 212-13. The Court termed notice by publication "a poor and sometimes a hopeless substitute" for more direct forms of notice, and said that its "justification is difficult at best." *Id.* at 213. *Eisen*'s citation to *Schroeder* strongly supports a conclusion that the Court viewed Rule 23(c)(2)'s individual notice requirement as mandated by the Due Process Clause.

Any doubts on that score were laid to rest by *Shutts,* a case that directly addressed the due process requirements that must be met before an absent class member can be bound by a state-court judgment. The Court relied explicitly on both *Mullane* and *Eisen* in holding that in such circumstances, the Due Process Clause prohibits a State from binding an absent class member to a court judgment unless he has received at least the level of notice required by *Mullane*, that is, notice "'reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Shutts,* 472 U.S. at 812 (quoting *Mullane,* 339 U.S. at 314). Because *Mullane* and *Eisen* had made clear that notice as so defined meant, at a minimum, sending notice to all interested parties whose

names and addresses could reasonably be ascertained, *Shutts*'s citation to *Mullane* and *Eisen* can only mean that the notice-by-mail requirement applies fully in the state-court class action context.

The trial court appears to have assumed that mailed notice can be excused whenever it is not "practicable" -- i.e., whenever, the costs of mailed notice would make the costs of maintaining the class action prohibitively expensive. *See, e.g.*, Pet. App. 28a-30a. But as the Court noted in *Eisen* and again in *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997), notice requirements "may not be relaxed based on high cost." *Amchem*, 117 S. Ct. at 2247 (citing *Eisen*, 417 U.S. at 173-77). Indeed, the Court suggested in *Amchem* the possibility that huge plaintiff classes may never be permissible because it is a "grav[e] . . . question whether class action notice sufficient under *the Constitution* and Rule 23 could ever be given to legions so unselfconscious and amorphous." *Amchem*, 117 S. Ct. at 2252 (emphasis added).

The trial court attempted to bolster its notice order by stating that the publication plan outlined by Respondents would actually provide better notice to class members than would mailed notice. Pet. App. 27a-28a. Suffice to say that this rather fanciful notion cuts against the collective wisdom of several generations of courts and public relations experts. *See, e.g., Eisen*, 417 U.S. at 175 ("[N]otice by publication has long been recognized as a poor substitute for actual notice.") If magazine and newspaper advertisements really were superior to direct mail in terms of drawing the attention of targeted segments of the public,

then marketers who rely heavily on direct mail have been acting in a highly irrational manner.[5]

Moreover, if the trial court is correct that mailed notice would not by itself provide effective notice to class members, then *Mullane* and *Eisen* suggest that the proper response would have been to order a print advertising campaign to *supplement* mailed notice, not to replace it. Nothing in those decisions suggests that due process permits trial courts to decide on a case-by-case basis that notice by publication alone provides the best practicable means of providing notice to class members. Trial courts are bound by this Court's directives regarding due process requirements until such time as the Court decrees, from the wisdom of experience, that notice by publication alone is no longer highly disfavored. At the very least, the Court should grant review to clarify this point, given that past directives regarding notice by publication are being increasingly ignored by trial courts.

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[5] One could reasonably assume that magazine publishers are among the most knowledgeable regarding the effectiveness of print marketing in reaching highly specific markets. If so, then there is a lesson to be learned from the manner in which magazine publishers promote themselves to the targeted audiences likely to purchase their magazines: virtually all of their promotional dollars go into direct mail, while virtually none goes into print advertising. *See* J. Edmonson, "Publishers' Anti-Ad Attitude Worsening," Business Marketing (Oct. 1, 1995).

III. STATE FARM WILL LOSE ALL OPPORTUNITY FOR EFFECTIVE REVIEW OF THE NOTICE ISSUE UNLESS REVIEW IS GRANTED NOW

Although review of the Illinois Supreme Court's judgment in this case unquestionably falls within this Court's jurisdiction, the Court is understandably reluctant to grant discretionary review in cases in which (as here) the underlying merits of the plaintiffs' claims have yet to be decided.

But such concerns should not prevent the Court from granting review in this case. This is so because unless review is granted, State Farm will lose all opportunity for effective review of the trial court's decision to dispense with mailed notice.

As the Court noted in *Shutts*, a defendant in a class action has a strong interest in ensuring that the entire plaintiff class is as bound by any judgment entered in the case as it is. *Shutts*, 472 U.S. at 805. If, as State Farm alleges, the notice by publication approved by the trial court is constitutionally inadequate, then absent class members will not be bound by any judgment entered in the case. State Farm will be forced to litigate in a heads-I-win-tails-you-lose atmosphere; any victory at trial would be pyrrhic because it would not protect State Farm from future lawsuits brought by absent class members dissatisfied with the judgment.

Moreover, if State Farm were to prevail on the merits at trial, it would have no adverse judgment to appeal from and thus would lose all opportunity to seek review of the notice order. Additionally, any further challenge to the

notice order following a victory on the merits would serve only to encourage additional lawsuits being filed against State Farm by absent class members.

Accordingly, if State Farm is to obtain any effective review of the notice order, it must be now. Just as in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), immediate appellate review of a matter is warranted when, as here, the matter could not be reviewed effectively on appeal from the final judgment. *Cohen*, 337 U.S. at 546.

CONCLUSION

Amici curiae Washington Legal Foundation, *et al.*, respectfully request that the Court grant the Petition.

Respectfully submitted,

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Dated: August 21, 1998